



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

FILE: [REDACTED] Office: Vermont Service Center

Date:

AUG 14 2000

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of the Foreign Residence Requirement
under Section 212(e) of the Immigration and Nationality Act, 8
U.S.C. 1182(e)

IN BEHALF OF APPLICANT:

INSTRUCTIONS:

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prevent clearly unwarranted
invasion of personal privacy

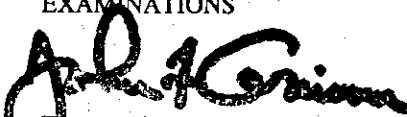
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: On a Service motion to reopen, the Director, Vermont Service Center, withdrew his previous decision approving the application and denied the application based on a United States Information Agency (USIA) finding. That decision was affirmed by the Associate Commissioner for Examinations on appeal. The matter is now before the Associate Commissioner on a motion to reopen. The order dismissing the appeal will be withdrawn and the appeal will be sustained. The matter will be remanded to the director to request that the § 212(e) waiver be reinstated by the USIA.

The applicant is a native and citizen of India who is subject to the two-year foreign residence requirement of § 212(e) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(e), because he participated in graduate medical education or training.

Based on the request by an interested government agency, the Director, USIA, recommended on April 28, 1997 that a waiver of the two-year foreign residence requirement be granted to the applicant in the public interest. On May 9, 1997, the Service granted the waiver so the applicant could perform services as a physician in a medically underserved area.

On March 24, 1998, the USIA notified the Service that the applicant may not be employed in accordance with the terms of § 214(l) of the Act, 8 U.S.C. 1184(l). On June 10, 1998, the director reconsidered the prior decision to grant the applicant a waiver of the two-year foreign residence requirement by withdrawing the prior decision and denying the application. The Associate Commissioner affirmed that decision after failing to receive additional documentation in the record for review.

On motion, counsel submits a letter from the Department of Human Resources, Health Division, Carson City Nevada, dated April 12, 1999, which reflects that staff members have concluded that the applicant has been practicing medicine in a medically underserved area. The administrator of the Conrad 20 Program and the State Health Division requests that the USIA and the Service reconsider the applicant's status. Counsel notes that this information was not sent to the Associate Commissioner for review. Counsel submits a letter from [REDACTED] verifying that the applicant has been in compliance with the requirement that he work at least 40 hours per week rendering medical care in an underserved area.

Section 214(l) of the Act, 8 U.S.C. 1184(l), provides, in part, as amended by IIRIRA which redesignated subsection (k) as subsection (l) that, in case of a request by an interested State agency, or by an interested Federal agency, for a waiver of the two-year foreign residence requirement under § 212(e) of the Act on behalf of an alien described in clause (iii) of such section, the Attorney General shall not grant such waiver unless-

(1) (C) in the case of a request by an interested Federal agency or by an interested State agency-

(i) the alien demonstrates a bona fide offer of full-time employment, agrees to begin

employment with the health facility or health care organization, which employment has been determined by the Attorney General to be in the public interest; and

(ii) an alien agrees to begin employment with the health facility or health care organization within 90 days of receiving such waiver, and agrees to continue to work for a total of not less than 3 years (unless the Attorney General determines that extenuating circumstances exist, such as closure of the facility or hardship to the alien, which would justify a lesser period of employment at such health facility or health care organization, in which the alien must demonstrate another bona fide offer of employment at a health facility or health care organization for the remainder of such three-year period); and

(1) (D) in the case of a request by an interested Federal agency (other than a request by an interested Federal agency to employ the alien full-time in medical research or training) or by an interested State agency, the alien agrees to practice medicine in accordance with paragraph (2) for a total of not less than 3 years only in the geographic area or areas which are designated by the Secretary of Health and Human Services as having a shortage of health care professionals. (Emphasis added).

(2) (A) Notwithstanding § 248(2), the Attorney General may change the status of an alien that qualifies under this subsection and § 212(e) to that of an alien described in § 101(a)(15)(H)(i)(b).

Sections 214(l) of the Act was amended by IIRIRA. In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. See Bradley v. Richmond School Board, 416 U.S. 696, 710-1 (1974); United States v. Schooner Peggy, 1 Cranch 103, 110 (1801); Matter of Soriano, Interim Decision 3289 (BIA 1996).

The record reflects that on January 23, 1997 Pulmonary Associates filed a request for a waiver of the two-year foreign residence requirement for the applicant under the Conrad State 20 Program. The waiver was approved on May 9, 1997 and the applicant was issued an H-1B nonimmigrant visa. He commenced employment on August 11, 1997 and continues to be employed with [REDACTED]. Due to an inadvertent intra-office clerical error, the applicant's prospective office location was listed in an Addendum to the Employment Contract and in another document as [REDACTED]. That location was incorrectly indicated as the office of another physician, [REDACTED]. The correct address of Dr. [REDACTED] was and continues to be [REDACTED] and across the street from [REDACTED]. When the applicant reported for work, the space at [REDACTED]

[REDACTED] was not available so the applicant shared an office with [REDACTED] where he treated patients from September 1, 1997 to March 17, 1998.

It is clear from the documentation in the record that the director's decision was made based on an incorrect conclusion about the applicant's office location. Based on the documentation in the record it is concluded that the applicant has been and still is practicing medicine in a medically underserved area and he has agreed to practice medicine in an underserved area for at least three years.

Since the applicant has now provided the evidence required by regulation at 8 C.F.R. 212.7, the order dismissing the appeal will be withdrawn and the appeal will be sustained.

It must be noted that a waiver under § 212(e) of the Act may not be reinstated without the favorable recommendation of the USIA. Accordingly, this matter will be remanded to the director to file a Request For USIA Recommendation Section 212(e) Waiver (Form I-613) together with the waiver application in this case (Form I-612). If the USIA recommends that the application be approved, the application must be approved. On the other hand, if the USIA recommends that the application not be approved, then the application must be re-denied without appeal.

ORDER: The appeal is sustained. The director's decision is withdrawn. The record of proceeding is remanded to the director for action consistent with the foregoing.